



August 8, 2001

Ms. Kimberley Mickelson
Olson & Olson
333 Clay Street, Suite 3485
Houston, Texas 77002

OR2001-3465

Dear Ms. Mickelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150483.

The City of Friendswood (the "city") received a request for personnel documents regarding Officer David Brechtel. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office a copy of the written request for information until July 27th, well after the statutory deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982).

You argue that the submitted information is excepted under section 552.108 of the Government Code. You have not provided a compelling reason under section 552.108 to overcome the presumption of openness. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Act can be waived); *but see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108).

However, the submitted documents contain some information that is excepted under section 552.101 of the Government Code, which provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Accordingly, we will address this information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that information about a juvenile in the submitted records is protected from disclosure under section 58.007 of the Family Code. However, section 58.007 operates as a confidentiality provision only when a juvenile has engaged in conduct which violates a law. You have not established that this provision is applicable to the submitted information. Based upon our review of the submitted information, we find this section inapplicable.

The common law right of privacy is incorporated into the Public Information Act by section 552.101. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

The work behavior of a public employee and the conditions for his or her continued employment are matters of legitimate public interest not protected by the common law right of privacy. Open Records Decision No. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action and background is not protected by common law privacy. Open Records Decision No. 444 (1986) (public has obvious interest in having access to information concerning the qualifications and performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of a sheriff's department); *see also* Open Records Decision No. 562 at 9, n.2 (1990) (public

has interest in preserving the credibility and effectiveness of the police force). Further, a governmental entity is not prevented from acquiring information about an employee's personal affairs when the information is gathered by the governmental agency in pursuit of a compelling governmental objective. *Id.* at 8-9. We have marked the information which must be withheld under section 552.101 in conjunction with common law privacy.

We note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). We have marked this information for your convenience.

The requested records contain information that is excepted from disclosure under section 552.117(2). The city must withhold from disclosure those portions of the records that reveal an officer's home telephone number and information about that officer's family members under section 552.117(2). We have marked information about officers' family members that must be withheld pursuant to section 552.117(2). To the extent that any of the submitted information reveals an officer's home telephone number, it must also be withheld under section 552.117(2).

Section 552.117(1) may also be applicable to some of the submitted information. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the school district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. The remainder of the information must be released.

In summary, the marked information must be withheld under section 552.101 in conjunction with common law privacy. The city must comply with the copyright law and is not required to furnish copies of records that are copyrighted, but must allow inspection of copyrighted

materials unless an exception applies to the information. Information made confidential by section 552.117 must be withheld. All other information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

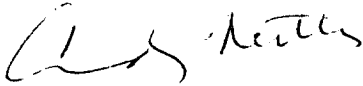
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 150483

Enc. Submitted documents

c: Mr. Robert Leighton Phillips
304 North Shadowbend
Friendswood, Texas
(w/o enclosures)